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In the Supreme Court of the United States

OCTOBER TERM, 1959

LARRY JOE MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. A., 1–8; R. 244–251) is reported at 273 F. 2d 279.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1959 (R. 252). A petition for rehearing was denied on January 22, 1960 (R. 253–256). The petition for a writ of certiorari was filed on February 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly refused to require disclosure of the name of an informer who merely

told law officers of the hidden location of marihuana and was not a participant with petitioner in its unlawful acquisition and transportation.

2. Whether the court erred in refusing to dismiss an indictment charging the unlawful acquisition and transportation of marihuana.

STATUTE INVOLVED

26 U.S.C. 4744 provides as follows:

(a) *Persons in General.*

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

STATEMENT

Petitioner was charged in count 1 of an indictment returned in the Northern District of Texas with the unlawful acquisition of 1527 grains of marihuana without having paid the special tax, in violation of 26 U.S.C. 4744(a), *supra*. Count 2 charged the unlawful transportation of this marihuana in violation

of the same statute (R. 1–2). The jury found petitioner guilty on both counts, and he was given a general sentence of imprisonment for five years (R. 227–228). On appeal, the conviction was affirmed (R. 228–229, 252).

The evidence adduced at the trial may be summarized as follows:

On September 16, 1958, a confidential informant told police officer Beaty that petitioner had a quantity of marihuana concealed on an unnamed road near Celestial Road in Dallas, Texas (R. 53–54, 224). Beaty and another officer found a jar buried in a hole covered with leaves a few feet from the unnamed road (R. 29–30). Laboratory tests showed that there were about 1527 grains of marihuana in the jar (R. 172–173). Officers put their initials on the jar from which a sample was taken, the jar was placed back in its hiding place, and the officers began a continuous surveillance (R. 30–33, 37, 175–176). The next day at about 6:45 p.m., petitioner appeared driving a Cadillac with another man as a passenger (R. 39, 66, 101–102, 117, 136–137). Petitioner left the motor running, walked to the leaf-covered hole, and picked up the jar of marihuana (R. 39–42). Beaty identified himself as a police officer and told petitioner to halt since he was under arrest, but petitioner jumped into the car and drove off, making about a ninety-degree turn from the unnamed road to Celestial Road (R. 42–43, 102–103, 137–138). Another officer, Stroud, shouted to the petitioner to stop, but jumped back into the bushes as the car drove by. Stroud fired four shots at the

tires of the car, but petitioner escaped (R. 103–104, 43, 64, 137). As the car was leaving the scene, Stroud saw in the air an object which had been thrown from the car (R. 105–106, 121–122). When this object was recovered, it proved to be the jar of marihuana upon which the officers had placed their initials for identification (R. 44–45, 107, 138–140).

Later that evening the officers found the Cadillac, with bullet holes piercing it and a flat tire, at the home of petitioner's adoptive mother. The officers had gone there for the purpose of arresting petitioner, but he was not found (R. 209, 212, 169, 180). Three days later, petitioner, having seen a newspaper account of his complicity in the crime, voluntarily surrendered to police officers (R. 180).

On September 22, 1958, federal agent Brown served on petitioner a demand for production of the required order form for a legal transfer of marihuana, but petitioner did not produce any such order form (R. 148, 151–153).

Prior to the trial, petitioner made a motion to produce as a witness the informer who had told the police where the marihuana could be found (R. 4–6). This motion was overruled (R. 6). At the trial, defense counsel asked during the cross-examination of officer Beaty for the informer's name so that he might be produced as a witness. The court refused to order the government to produce the witness on the ground that the informer's life might be endangered if his name were disclosed (R. 54–56).

ARGUMENT

1. Petitioner's contention (Pet. 6–9) that the court erred in not requiring disclosure of the name of the informer is based on a misinterpretation of *Roviaro* v. *United States*, 353 U.S. 53. This Court held in *Roviaro* that the question whether the Government is required to disclose the identity of an informer "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62. In *Roviaro* and the lower court cases cited by petitioner, the evidence showed clearly that the informer was an active participant and collaborator with the accused in the illegal transaction and therefore his testimony was highly relevant to the defense. See *id.* at 62, 63–64, note 12. On the other hand, in the instant case there is no indication that the informer was an associate of the accused. The information provided by the informer as to the location of the marihuana did not suggest that he was a participant in the criminal transactions, but merely provided the reason for the officers' surveillance. Just as in *Scher* v. *United States*, 305 U.S. 251, 254, the "source of the information which caused him to be observed was unimportant to petitioner's defense."

The record here does not suggest that the testimony of the informer would have had any substantial importance. Petitioner's counsel neither showed, nor even attempted to show, how the informer's testimony might aid in his defense (see R. 54–56). When the existence of the informer was brought out on cross-examination of officer Beaty, counsel made no effort to establish the extent of the informer's information. Instead, he was satisfied merely to ask for "the name of the informer in this case, that we may have him here as a witness" (R. 55). With the record in this posture and in view of the court's fear, justified by past experience in similar cases, for the informer's life (R. 54–56), proper balancing of the public interest did not require disclosure.[1]

2. The indictment (R. 1–2), apart from the allegations in the bills of particulars,[2] was sufficient. Both counts of the indictment followed substantially the wording of the statute and embodied all the elements of the crime. They fully informed the petitioner of the charges against him, so that he could prepare his

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[1] At the trial petitioner did not claim that the man seen with him in the Cadillac was the informer. His belated contention in the court of appeals and in his petition is completely without support in the record (see Pet. App. A-6).

[2] Contrary to petitioner's assertion (Pet. 11), the two bills of particulars were not contradictory. The first alleged how petitioner acquired the marihuana (the location of which was described) from the depression in the ground and transported the marihuana in the Cadillac (R. 7–8). The second, with regard to the original and different acquisition, merely alleged that the marihuana had been acquired by the petitioner from persons unknown to the government (R. 9).

defense and be in a position to plead the judgment in bar of any further prosecutions for the same offense. Having satisfied these requirements, the indictment was sufficient whether or not it could possibly have contained more definite allegations. See *United States* v. *Debrow*, 346 U.S. 374, 377–378; *Hagner* v. *United States*, 285 U.S. 427, 431; *Bunn* v. *United States*, 260 F. 2d 313, 316 (C.A. 8).

Petitioner's specific contentions (Pet. 10–13)—that the indictment was insufficient because it failed to allege that the accused was "required to pay" the transfer tax or to describe the manner in which the marihuana was transferred—are completely without merit. First, there is no substantial difference between the allegation in the indictment that petitioner was "subject to pay" the transfer tax and the wording in the statute that he was "required to pay" it. Second, the statute does not require the indictment to describe the manner in which the marihuana was transferred. In fact, under 26 U.S.C. 4744, the government need not offer evidence of the transfer even at trial since possession of marihuana and failure to produce the required order form in themselves constitute presumptive evidence of guilt.

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[1] Even now, petitioner does not claim that he was misled or surprised by the alleged defects in the indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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